

ASSINIBOINE AND SIOUX TRIBES

IBLA 84-819, 84-836

Decided February 5, 1985

Appeals from decisions of the Montana State Office, Bureau of Land Management, approving memorandum of understanding (OGM (BLM/MBOGC MOU)) and, in part, approving application of well location and spacing rules to Indian lands (M MBOGC 30-84).

Affirmed.

1. Bureau of Land Management -- Indians: Mineral Resources: Oil and Gas: Generally -- Oil and Gas: Generally

BLM may properly rely on public hearings conducted, and adopt past and future decisions rendered by a State board with respect to oil and gas conservation within Indian lands where BLM retains the ultimate jurisdiction to approve such decisions and, in fact, exercises an independent review function, prior to such adoption.

APPEARANCES: Marvin J. Sonosky, Esq., and Kevin A. Griffin, Esq., Washington, D.C., for appellants; Edwin Zaidlicz, State Director, Montana, Bureau of Land Management, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation have appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated June 19, 1984, approving a memorandum of understanding (MOU) between BLM and the State of Montana, Board of Oil and Gas Conservation (State Board), and a decision of the same office, BLM, dated July 27, 1984, approving in part the application of well location and spacing rules of the State Board (set forth in State Board Order No. 19-83) to certain Indian lands by expansion of the Lustre Field, Valley County, Montana. 1/

1/ The Indian lands made subject to State Board Order No. 19-83 are situated within secs. 1 through 3, T. 30 N., R. 43 E., sec. 6, T. 30 N., R. 44 E., secs. 13, 14, 23 through 26, 34 through 36, T. 31 N., R. 43 E., and secs. 18 and 19 and the S 1/2 sec. 31, T. 31 N., R. 44 E., Principal Meridian, Montana.

This case stems from the MOU entered into by BLM and the State Board to "provide consistent statewide oil and gas orders, policies and procedures affecting federal (including Indian) lands as well as non-federal lands" (MOU at 1). The MOU provides that the State Board shall "initially" consider all matters involving Federal and/or Indian minerals which would require State Board approval if "non-Federal minerals were involved," unless BLM "prior to the hearing on any matter" requires the State Board to "decline to hear the matter and, instead, refer it to the BLM for decision" (MOU at 2). The MOU further provides that the State Board will notify BLM of any request for hearing relating to or involving Federal lands (including Indian lands). BLM may protest any requested determination prior to or at a hearing, in which case the State Board "shall either issue its order incorporating the conditions of the protest or shall relinquish jurisdiction to the BLM over the matter insofar as it relates to Indian land" (MOU at 3). In the absence of a protest or an objection to any determination, BLM shall be construed as having concurred with the State Board "pending the approval of the authorized officer of the BLM." Id. BLM approved the MOU on June 19, 1984.

In their appeal docketed as IBLA 84-836, appellants object to the provision in the MOU to the effect that "all existing decisions of the State Board involving Indian lands will remain in effect subject to the right of all parties to request that specific orders be reviewed." Id. at 4. The MOU states that this provision applies to "those decisions not previously placed in effect on Indian lands or those recommended to the BLM for approval."

In its July 1984 decision, which is the subject of the appeal docketed as IBLA 84-819, BLM approved, in part, application of the State Board well location and spacing rules to certain Indian lands. BLM stated that it had reviewed all engineering and geological evidence and concluded that application of the rules adopted by the State Board "would result in the protection of correlative rights of all owners and in the maximum ultimate recovery of oil and gas with minimum waste."

In their statements of reasons for appeal, appellants initially question this Board's jurisdiction to hear these appeals. Appellants contend that jurisdiction to hear appeals involving Indian lands rests with the Board of Indian Appeals or the Secretary of the Interior. Appellants refer to 43 CFR 3165.4, which governs appeals involving the regulation of onshore oil and gas operations, and states that, with respect to Indian lands, instructions, orders, or decisions "may be appealed in accordance with the provisions of * * * 25 CFR Part 2." 25 CFR Part 2 provides for appeals to the Board of Indian Appeals from decisions of the Commissioner of Indian Affairs. 25 CFR 2.3(a). 25 CFR 2.3(c) also provides that such appeals "shall be made in the manner provided in * * * 43 CFR Part 4, Subpart D." The limitations on the scope of appeals to the Board of Indian Appeals under 43 CFR Part 4, Subpart D, must be read in pari materia with the regulations in 25 CFR Part 2. In particular, 43 CFR 4.330(b) provides that, with certain exceptions, the Board of Indian Appeals

shall not adjudicate * * * appeals from decisions of the Commissioner of Indian Affairs pertaining to final recommendations or actions by officers of the Conservation Division, Geological

Survey [2/] unless the Commissioner's decision is based on an interpretation of Federal Indian law (Commissioner's decisions not so based which arise from determinations of the Geological Survey are appealable to the Board of Land Appeals in accordance with 43 CFR 4.410).

The present cases involve two decisions by BLM and do not involve decisions by the Commissioner of Indian Affairs. As previously noted, 43 CFR 4.330(b) states that, in cases involving such decisions and not involving an interpretation of the Federal Indian law (as is the case herein), an appeal would lie with this Board. Moreover, the regulation governing the scope of appeals before this Board, 43 CFR 4.410, provides that any party to a case adversely affected by a "decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the Board." The regulation does not limit its applicability to non-Indian land. We conclude that the applicable regulations, while somewhat circuitous, clearly indicate that appeals from BLM decisions involving onshore oil and gas operations on Indian lands (with or without the concurrence of the Commissioner of Indian Affairs) are subject to appeal to this Board.

Appellants contend that BLM approval of the MOU provision adopting previous State Board decisions and application of State Board Order No. 19-83 to Indian lands are improper delegations of Federal jurisdiction over Indian lands to a State agency, without congressional authorization, citing Planned Parenthood Federation of America, Inc. v. Heckler, 712 F.2d 650, 663 (D.C. Cir. 1983), and Sierra Club v. Sigler, 695 F.2d 957, 962-63 n.3 (5th Cir. 1983). Appellants note that in the case of Indians, where the Federal Government has a fiduciary responsibility, congressional authorization must be specific and clear and will be strictly construed by the courts, citing Washington v. Yakima Indian Nation, 439 U.S. 463, 484 (1979), and Bryan v. Itasca County, 426 U.S. 373 (1976). Appellants contend that there has been no such congressional authorization of the delegation of Federal jurisdiction over Indian lands, seek reversal of BLM's approval of the MOU provision and approval of application of State Board Order No. 19-83, and ask the Board to remand the case to BLM with instructions "to arrive at a decision independently of the proceedings before the State Board."

Appellants also contend that BLM approval of the MOU provision and application of State Board Order No. 19-83 without provision for notice and an opportunity to be heard prior to approval violates appellants' rights to procedural due process, where BLM approval adversely affected the property interests of appellants and individual tribal members. Appellants also note that in a memorandum of agreement between BLM, the Bureau of Indian Affairs (BIA), and appellants, signed by all parties as of June 4, 1984, BLM has agreed to provide prior notice of such action. Finally, appellants contend that BLM approval, in both instances, was improper because it was not supported by any statement of findings or reasons, citing Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978).

2/ Responsibilities of the Conservation Division, Geological Survey, for management of onshore oil and gas lease operations have been reassigned to BLM by Secretarial Order. See 47 FR 4751 (Feb. 2, 1983) and 48 FR 8983 (Mar. 2, 1983).

[1] It is well established that the State Board has no jurisdiction over lands held in trust by the Federal Government for Indian tribes or individual Indians. Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, Civ. No. CV-83-79-GF (D. Mont. Nov. 7, 1983); Assiniboine and Sioux Tribes v. Calvert Exploration Co., 223 F. Supp. 909 (D. Mont. 1963), rev'd on other grounds sub nom. Yoder v. Assiniboine and Sioux Tribes, 339 F.2d 360 (9th Cir. 1965). 3/ However, appellants do not contend that the State Board has asserted any jurisdiction over Indian lands in either instance under appeal. Rather, the gravamen of appellants' objections is that BLM has improperly delegated Federal jurisdiction over Indian lands by effectively abnegating its responsibility to independently approve decisions with respect to Indian lands.

The MOU indicates that although the State Board has the authority to conduct hearings and render determinations, BLM retains not only the authority to object to a hearing by the State Board and any proposed or final determination of that Board, but the final authority to approve application of a determination to Indian lands. The MOU specifically states at page 6, that "[f]uture decisions or other orders involving Indian lands shall only be binding upon the signature of the Authorized Officer of the BLM." Appellants contend that this provision is a "sham" and that BLM approval is "nothing more than a rubberstamp." However, in the absence of any evidence that BLM has acted or intends to act as a "rubberstamp," it cannot be said that BLM has not retained its independent review authority. See Sierra Club v. Sigler, supra at 962-63 n.3.

Indeed, in its answer to the statements of reasons BLM states that it uses the State Board "hearing process only to gather and hear evidence, and we render separate BLM decisions on federal or Indian Trust lands." 4/

3/ Appellants state that they have also filed suit in Assiniboine & Sioux Tribes v. Board of Oil and Gas Conservation, Civ. No. CV-84-62-GF (D. Mont.), seeking a determination that BLM cannot delegate Federal jurisdiction over Indian lands to a State agency. That suit was dismissed by the Montana District Court on Nov. 19, 1984, pursuant to a motion by the Secretary of the Interior.

4/ This position is more fully explained in a memorandum dated Aug. 8, 1984, from the State Director, Montana State Office, BLM, to the Field Solicitor, Billings, Montana, at page 2:

"The Montana Board of Oil and Gas Conservation (MBOGC) (also referred to as the 'Board') has an established, legal, and effective public hearing process for hearing technical evidence that presently hears all non-Indian, non-federal spacing issues. This process of calling public hearings with legal publications and notifying adjacent involved mineral owners is merely a hearing process totally independent of the MBOGC rendering of decisions. The BLM MSO through our 'Triparty' MOU (6/14/84), and an MOU with the MBOGC (6/19/84), utilizes this hearing process for Trust and federal minerals and then renders decisions totally independent of the MBOGC decision process. In fact, no consultation with the MBOGC on other than hearing processes and protocol occurs in the BLM decision process."

(Emphasis in original.)

In support of its position BLM has submitted a copy of a letter dated February 27, 1984, from the Assistant Secretary for Land and Minerals Management to one of appellants' attorneys, which indicates that the MOU is consistent with Departmental policy. Assistant Secretary Carruthers states that:

[I]t has been our experience that cooperation with the State regulatory bodies in these matters is mutually beneficial in order to protect the correlative rights of all concerned parties. Thus, we have followed the longstanding practice of requiring that operators of Federal and Indian leases adhere to the well spacing and well location requirements established by the appropriate State regulatory bodies, while reserving the right to impose differing requirements in those instances where adherence to a State's requirements is considered not to be in the public interest or in the best interests of the Indian lessors.

We think this policy is not only sensible, but is also one which assures that all affected parties will be represented properly in the decisionmaking process. Moreover, we do not see this position as conflicting with the various court decisions in this regard, and believe it provides the Secretary the necessary flexibility to carry out the Department's responsibilities. In other words, we believe the Secretary may utilize the existing capability of State agencies in order to discharge this aspect of his trust responsibilities.

Moreover, in Assiniboine & Sioux Tribes v. Board of Oil and Gas Conservation, supra at note 3, the court considered the question of whether the MOU represents an "illegal delegation of the authority granted the Secretary by Congress as the trustee of Indian lands." The court concluded that the MOU "merely represents a means the Secretary has chosen to elucidate facts in an effort to render an informed decision with respect to exploration and development of oil and gas deposits on Indian lands. * * * The court is unable to conclude * * * that the Secretary has delegated any authority with which he is vested in relation to Indian lands." The July 1984 decision which approves application of the well location and spacing rules set forth in State Board Order No. 19-83 to certain Indian lands is further evidence of the exercise of the independent review authority retained by BLM in the MOU. There has been no showing that BLM did not consider the relevant evidence in deciding whether to adopt the State Board's order, or that BLM did not reach an independent determination based on that evidence.

Likewise, we conclude that, to the extent that the MOU constitutes an acceptance by BLM of "existing" State Board decisions involving Indian lands, it is also the exercise of BLM's independent review authority. The MOU provision to which appellants object states that acceptance of existing State Board decisions is to be "[c]onsistent with the terms of this agreement" (MOU at 4). The terms of the MOU include the statement that BLM retains ultimate jurisdiction over Indian lands. In addition, the contested provision states that acceptance is "subject to the right of all parties to request that specific orders be revised." We note that BLM interprets this memorandum provision to mean that aggrieved parties may "file with the BLM for relief,"

whereupon BLM "would revoke the order and issue a new order, or sustain the existing order." Moreover, in the memorandum to the Field Solicitor, Billings, Montana, dated August 8, 1984, BLM states, at page 4, that a request for review would also require invocation of the hearing provisions of the MOU. We conclude that the MOU does not constitute a delegation by BLM of its jurisdiction over Indian lands.

Appellants also contend that they were not provided notice and an opportunity to be heard prior to BLM's approval of the MOU provision and application of State Board Order No. 19-83 to Indian lands. Appellants acknowledge that they were "aware" of the negotiations between BLM and the State Board with respect to the MOU, but contend that they were not advised of the substance of those negotiations or given an opportunity to participate. Although we can find no evidence that appellants participated in the formulation of the MOU, we note that the MOU does invite the participation of appellants and other parties to request review of the particular orders covered by BLM's adoption of existing State Board decisions. We also note that, as interpreted by BLM, such review would involve the hearing provisions of the MOU, including the provision that: "Notices of all hearings and determinations affecting Indian lands shall be given by the applicant to the Indian owners at the address provided by the Indian Agency having jurisdiction over the land."

This Board has long held that an appellant's right to appeal to this Board from an initial BLM decision which may adversely affect him (for example, deprivation of property by virtue of that decision) satisfies his due process rights. Philip A. Cramer, 74 IBLA 1 (1983), and cases cited therein. Thus, appellants have been afforded notice and an opportunity to be heard by appealing to the Board.

We also note that adoption of State Board Order No. 19-83 by BLM was subsequent to a public hearing before the State Board and that, in accordance with the MOU, appellants were provided notice of that hearing by letter received by appellants on June 15, 1984. Appellants have clearly been afforded an opportunity to participate in BLM's decisionmaking in this matter. In either case, we can find nothing in the MOU which is inconsistent with the memorandum of agreement between BLM, BIA, and appellants. The memorandum of agreement only obligated BLM to provide notice of a request for a "hearing" in connection with the formulation of oil and gas field rules involving Indian lands, an opportunity to make appellants' views known and notice of any decisions.

Finally, appellants contend that BLM approval of the MOU and the application of State Board Order No. 19-83 to Indian lands was not supported by adequate findings of facts or reasons. However, appellants have not identified either any existing State Board orders adopted by BLM under the MOU to which they object or the reasons why they object to the application of such orders or State Board Order No. 19-83 to Indian lands. Although the BLM decision does not fully set forth the underlying rationale, the Board will not undertake a wholesale assessment of the validity of these decisions when appellants have not made at least a minimal showing of specific error. In

the absence of such a showing, we must affirm the decisions under appeal. United States v. Connor, 72 IBLA 254 (1983). 5/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Gail M. Frazier
Administrative Judge

5/ Appellants, of course, retain the right to request that BLM reassess its application of State Board Order No. 19-83 to Indian lands and to request a review of specific existing orders adopted under the MOU.

